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No. 88-487

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioner,

v.

HAWKEYE-SECURITY INSURANCE COMPANY
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. MANGAPORA, P.C.
By: MICHAEL J. MANGAPORA
Attorney for Respondent
Hawkeye-Security Insurance Company
926 Mott Foundation Building
Flint, MI 48502
(313) 239-5200

BOWNE OF DETROIT
615 SECOND AVENUE - DETROIT, MICHIGAN 48226 - (313) 964-1330

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QUESTIONS PRESENTED

1. Should this Court grant certiorari on the issue involved in case-at-bar when the Court has previously considered whether to grant certiorari on the same issue and denied the petition for writ of certiorari? *Northern Group Services, Inc.,* 833 F2d 85 (6th Cir. 1987), cert. denied, ___ U.S. ___, 108 S. Ct. 1754 (1988)

2. Should this Court grant certiorari on an ERISA pre-emption claim against MCLA 500.3109a of Michigan's No-Fault Automobile Insurance Act where there is no conflict between the United States Courts of Appeal for Sixth and Seventh Circuits as to whether the statute is pre-empted by ERISA?

3. Should this Court grant certiorari on an ERISA pre-emption claim against MCLA 500.3109a where there is no conflict between the decisions of this Court and the decisions of the Sixth Circuit regarding the ERISA pre-emption issue in question?

STATEMENT OF CORPORATE AFFILIATES, PARENTS, AND NOT-WHOLLY-OWNED SUBSIDIARIES

HAWKEYE-SECURITY INSURANCE COMPANY

Parent: USLICO Corporation

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SUMMARY OF ARGUMENT

For several reasons, the Court should not accept this case for review.

First, the Court has already considered whether to grant a petition for writ of certiorari on the issue involved in the case-at-bar and has denied the petition. *Northern Group Services, Inc. vs. Auto-Owners Ins. Co.,* 833 F. 2d 85 (6th Cir. 1987), cert denied ____ U.S. ____, 108 S. Ct. 1754 (1988).

Second, there is no conflict between the United States Court of Appeals for the Sixth and Seventh Circuits because both Circuits have rejected petitioners sole argument that Section 500.3109a of Michigan's No-Fault Act Automobile Insurance is pre-empted by ERISA. Although the respective circuits have used a different analysis to find the state insurance law is not pre-empted by ERISA, neither circuit has upheld petitioner's claim that ERISA totally pre-empts operation of the state insurance law.

Third, there is no conflict between the decisions of the Sixth Circuit Court of Appeals and this Court regarding ERISA pre-emption of state insurance law regulation of self-funded employee benefit plans. In fact, the decisions of this Court recognize that when a state insurance law is at issue, the presumption is against pre-emption.

ARGUMENT

A. THIS COURT HAS PREVIOUSLY CONSIDERED WHETHER TO GRANT CERTIORARI ON THE SAME ISSUE INVOLVED IN THE CASE-AT-BAR AND HAS DENIED THE PETITION FOR WRIT OF CERTIORARI.

In *Northern Group* the United States Sixth Circuit Court of Appeals held that MCLA 500.3109a of Michigan's No-Fault Automobile Insurance Act was not pre-empted by ERISA. Relying on *Northern Group* another panel of the Sixth Circuit ruled

that decision was dispositive of the issue involved in the case-at-bar. This Court has recently denied certiorari in *Northern Group* and respondent requests a denial of the petition for writ of certiorari in the case-at-bar for the same reasons the petition was denied in *Northern Group.*

B. THERE IS NO CONFLICT BETWEEN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH AND SEVENTH CIRCUITS ON THE QUESTION WHETHER ERISA PRE-EMPTS SECTION 500.3109a OF THE MICHIGAN NO-FAULT AUTOMOBILE INSURANCE ACT.

Petitioner contends the Sixth Circuit decisions in the case-at-bar and *Northern Group* are in conflict with the Seventh Circuit in *Winstead v. Indiana Ins. Co.,* App No. 87-2437, slip op. (7th Cir. August 22, 1988) However, both Circuits held MCLA 500.3109a was not pre-empted by ERISA. Although the respective circuits used a different analysis to find there was no pre-emption, the difference in analysis does not mean the respective circuits are in conflict. The insurance company in *Winstead* failed to raise on appeal the arguments raised on appeal by the insurance companies in *Northern Group* and the case-at-bar. In fact, the Seventh Circuit declined to engage in an analysis of the *Northern Group* decision and stated the insurance company had waived any arguments derived from that analysis for purposes of its appeal from the district court. (See Appendix E of Petition, pp. 6e-8e).

Thus, in light of the fact that the Seventh Circuit did not even consider the analysis of the Sixth Circuit in *Northern Group*, petitioners statement that the decisions of the respective circuits are in conflict is in error. The decisions of the respective circuits have both rejected petitioners claim that ERISA totally pre-empts and renders unenforceable the coordination of benefits provision contained in a Michigan no-fault automobile insurance policy by virtue of MCLA 500.3109a.

C. THERE IS NO CONFLICT BETWEEN THE DECISIONS OF THIS COURT AND THOSE OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT REGARDING THE ERISA PREEMPTION ISSUE IN QUESTION.

Petitioner contends the Sixth Circuit decisions in the case-at-bar and *Northern Group* directly conflict with several of this Court's decisions which construe Section 514 of ERISA, 29 U.S.C. Section 1144. However, the Sixth Circuit decisions are not in conflict, either directly or indirectly, with any of the Court's decisions cited by petitioner. Specifically, the Sixth Circuit decisions do not conflict with *Metropolitan Life Ins. Co. vs. Massachusetts,* 471 U.S. 724; 105 S. Ct. 2380; 85 L. Ed. 2d 728 (1985), in which this Court held that when a state insurance law is at issue, "[t]he presumption is against pre-emption." 471 U.S. at 741. As the Sixth Circuit noted, this Court did not render a definitive interpretation of the deemer clause in *Metropolitan Life. Northern Group* at 833 F. 2d 90-91 (1987). Because *Metropolitan Life* did not reach or involve any issue concerning the deemer clause, the Court's comment about what the deemer clause might mean was obiter dicta. Moreover, as the Sixth Circuit noted:

> Nor is this approach inconsistent with the dicta in *Metropolitan Life* concerning insured versus self-insuring plans. 471 U.S. at 740-41, 747, 105 S. Ct. at 2389-90, 2393. We preserve a distinction between insured and self-insuring plans. Insured plans would be per se "open to indirect regulation." Id. at 747, 105 S. Ct. at 2393. Self-insuring plans would be subject to state regulation only when no independent federal interest in national uniformity exists to inform and guide the creation of federal common law.
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> Id. at 94-95 (citations omitted).

CONCLUSION AND RELIEF

The petition should be denied because this case is not appropriate for Supreme Court review. The Court has previously considered whether to grant certiorari on the same issue involved in the case-at-bar and denied the petition. There is no conflict among the circuits as to whether ERISA pre-empts state coordination of benefits rules from being applied to uninsured plans. Finally, the Sixth Circuit decisions regarding the ERISA pre-emption issue involved in the case-at-bar are not in any way in conflict with the decisions of this Court.

MICHAEL J. MANGAPORA, P.C.
BY: MICHAEL J. MANGAPORA
Attorney for Respondent
Hawkeye-Security Insurance Company
926 Mott Foundation Building
Flint, MI 48502
(313) 239-5200

DATE: December 8, 1988